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April 12, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Response to Report" filed by David A. Ringer on April 1, 1994.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

  
Stephen T. Yelverton

Enclosure

B:CATON.133

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: The Review Board

RESPONSE TO REPORT

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By:

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April 12, 1994

B:CATON.133

### RESPONSE TO REPORT

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this "Response to Report." On April 1, 1994, David A. Ringer ("Ringer") filed a "Report Concerning Status of Tower Site."

ORA requests leave to file this response. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because Ringer's pleading raises certain potential basic qualifying and non-integration matters, a response is appropriate. In support of its response, ORA offers the following comments.

In his report, Ringer states his proposed tower site has been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Ringer further claims that he has received "reasonable assurance" of the availability of the tower site from the new owner. However, he has not received a written agreement. Ringer represents that he will file with the Commission an amendment to his application upon receipt of the written agreement.

ORA reserves the right, pursuant to Section 1.294 (b), to file an opposition or response to the amendment. It is expected that Ringer would disclose in his amendment when he was first aware that the tower site was sold, if he was aware before receiving the March 2, 1994, letter from Mid-Ohio. Such information is necessary to determine whether Ringer timely reported the loss of his tower site within thirty (30) days, pursuant to Section 1.65, and whether he has acted with "due diligence" in obtaining "reasonable assurance" from the new owner. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982).

It is also expected that Ringer would disclose in his amendment whether his technical proposal has changed in any way, such as a change in the transmitter height, in order to accommodate use of the tower by the new owner. A change in Ringer's technical proposal could raise basic qualifying issues, or signal coverage issues.

Submission of the new tower site agreement would be necessary to determine whether Ringer's cost estimates are now inadequate because of an increase in the lease payments by the new owner. If Ringer's lease payments have increased beyond his stated availability of funds, then financial qualifications issues would be raised.

Under established Commission precedent, a post-designation amendment can not be accepted if acceptance would require the specification of new issues, require additional hearings, or allow the petitioner to gain a comparative signal coverage advantage. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970). It is expected that Ringer would make a full disclosure about the sale of his proposed tower site and the obtaining of a new tower site agreement in order for the Commission to make an informed judgment as to whether additional issues or hearings would be required by acceptance of his amendment.

The March 2, 1994, letter submitted by Ringer with his report indicates that he never had "reasonable assurance" from Mid-Ohio of his proposed tower site. The letter states in pertinent part that Mid-Ohio had only been "willing to negotiate" with Ringer a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, para. 9. More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd. 1989). Accordingly, Ringer must demonstrate in his amendment that he had "reasonable assurance" of his proposed tower site at the time of initially filing his application.

WHEREFORE, in view of the foregoing, ORA submits these comments with respect to Ringer's proposed tower site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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April 12, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 12th day of April, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Response to Report" to the following:

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